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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

COMMENTS OF AT&T CORP.

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SUMMARY

This is the Commission's first foray into the electronic surveillance arena. Its actions here will set the standard for all carriers, for all technologies, for the foreseeable future. Accordingly, AT&T welcomes the opportunity to submit these comments and urges the Commission to proceed carefully in this rulemaking to ensure that the Communications Assistance for Law Enforcement Act ("CALEA") is implemented as Congress intended -- narrowly, efficiently and with balance.

A standard for implementation of the assistance capability requirements of CALEA has been promulgated by industry under the auspices of the Telecommunications Industry Association ("TIA"). The industry finally can move forward to meet its obligations under CALEA, but it is certain that the Commission will need to extend the CALEA October 25, 1998 compliance date to allow manufacturers to develop solutions for carriers to implement. In these Comments, AT&T specifically addresses the Commission's proposals for extension requests as well as for making determinations as to whether implementation is reasonably achievable under the statute.

AT&T also responds to the Commission's request for comments on the electronic surveillance security procedures for carriers proposed by the Federal Bureau of Investigation ("FBI"). AT&T has a long history of cooperating with law enforcement in the investigation of criminal activity and in conducting lawfully authorized electronic surveillance. With a generation of experience in executing court-ordered wiretaps in a secure manner, AT&T has developed procedures to ensure that wiretaps, as well as other requests by government agencies for information, are processed in strict accordance with the law. The vast majority of surveillance is accomplished across the industry without any security risk or breach. AT&T therefore urges the

Commission to consider a less prescriptive approach to meeting the security requirements of CALEA than set forth generally in the NPRM.

Finally, the Commission has requested comment on whether CALEA extends to information services provided by common carriers. The Commission should confirm that all information services are exempt from CALEA's assistance capability requirements regardless of whether such services are provided by a common carrier. Any other result would stifle innovation and result in unfair competitive advantages for entities that exclusively provide information services, but that would bear none of the substantial costs associated with CALEA compliance.

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COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") regarding its responsibilities under the Communications Assistance for Law Enforcement Act ("CALEA").¹

I. INTRODUCTION

A. AT&T Interest

AT&T has a long history of cooperating with law enforcement in fighting crime. Specifically, AT&T, through its wireless subsidiary, AT&T Wireless Services, Inc. ("AWS"), has been an industry leader, for example, in training law enforcement to recognize and combat cellular cloning. AWS trained 15,000 law enforcement officers in 1997. AWS's commitment to law enforcement is evidenced by its routine assistance during emergency situations.² Criminals involved

¹ Communications Assistance for Law Enforcement, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997.

² Examples of emergency cases where AWS's resources and expertise were solicited by law enforcement include the Harvey Weinstein kidnapping case of August 1993 whereby the kidnappers had the victim use a cloned cell phone to communicate their ransom demands; the Paramus police officer who, while responding to a prank 911 call from a cell phone, died on route; the Tuxedo, NY manhunt of a killer who used a cell phone to communicate with police.

in numerous cases using illegal cellular phones were apprehended, in part, due to the diligence of AT&T employees who provided law enforcement with the vital information they needed.

AT&T has also been a leader in industry efforts to have legislation passed to address the seriousness of cellular fraud crimes. AT&T's efforts have resulted in the successful passage of felony-level wireless fraud legislation in nearly half the United States to date. The message is clear: cloned phones and their related paraphernalia are deadly weapons in the hands of the criminal end user. Cloners are service providers to criminal enterprises. Thus, AT&T approaches law enforcement and its needs with significant experience and understanding.

AWS operates wireless voice and/or data communications systems in all 50 states. It is the major wireless communications provider in two of the top three metropolitan areas for electronic surveillance. For example, between October 1994 and October 1995, in just three major metropolitan areas, AWS handled 447 Title III wiretaps and 868 pen register or trap and trace orders, and during that time, AWS has not had a security breach where the integrity of the wiretap was compromised.

Shortly after passage of CALEA, AT&T, through AWS, took the lead to initiate an effort through Telecommunications Industry Association ("TIA") for the standardization of lawfully authorized electronic surveillance to meet the assistance capability requirements of Section 103 of CALEA.³ AWS chaired the TIA subcommittee that crafted the industry standard. With the full support of AT&T, the industry standard has since been published as a TIA Interim

³ AT&T supported promulgation of the industry standard, as well as earlier efforts by industry to produce the standard, and the Commission should be forward-looking now in the implementation of the standard. See, e.g., In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, Cellular Telecommunications Industry Association ("CTIA") Petition (Jul. 16, 1997) at 2 (asking the Commission to promulgate the industry standard and for an extension of time to comply with CALEA's requirements).

Standard. AT&T also strongly supported the ad hoc subcommittee recommendation that TIA ultimately publish the document as an American National Standards Institute ("ANSI") standard.

B. CALEA Framework

In passing CALEA, Congress sought to balance three important policies:

(1) preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts, (2) protect privacy in the face of increasingly powerful and personally revealing technologies, and (3) avoid impeding the development of new communications services and technologies.⁴ Congress empowered the Commission to be the arbiter of any disputes concerning how to strike this balance.

Section 103 of CALEA sets forth the basic obligation of carriers to maintain the pre-enactment status quo of electronic surveillance so law enforcement could continue to intercept the content of communications carried on a carrier's network and have access to the numbers dialed to or from a target phone.⁵ To achieve this goal, Congress understood that manufacturers would have to cooperate with carriers to make available CALEA-compliant equipment in a timely manner.⁶ As Congress noted, "without [manufacturers'] assistance, carriers likely could not comply with the capability requirements [of CALEA]."⁷

⁴ Id. at ¶ 5. See House Rep. No. 103-827 (1994), reprinted in 1995 U.S.C.C.A.N. 3489, 3493 ("House Report").

⁵ 47 U.S.C. § 1002.

⁶ 47 U.S.C. § 1005.

⁷ House Report at 3506.

Congress established a mechanism for implementation of the capability requirements that deferred "in the first instance" to industry standards organizations.⁸ CALEA provides a "safe harbor" for any carrier or manufacturer that meets a publicly available standard or technical requirements.⁹ Once standards were in place and commercially available, Congress correctly believed that cost-efficient implementation of CALEA would follow. Indeed, Congress concluded that standardized implementation was so important that it authorized the Commission to set standards if industry failed to do so.¹⁰

Understanding that the standards process and the CALEA compliance date might not coincide, Congress authorized the Commission to grant an extension of time for up to two years to achieve compliance if compliance could not be reasonably achieved through commercially available hardware or software.¹¹ Congress also recognized that meeting CALEA's mandate could impose undue burdens on the telecommunications industry even if standardized solutions were available. Accordingly, Congress authorized the Commission to relieve a carrier or manufacturer from CALEA obligations to the extent necessary to avoid significant cost or complexity.¹²

⁸ Id.

⁹ See 47 U.S.C. § 1006(a).

¹⁰ 47 U.S.C. § 1006(b).

¹¹ 47 U.S.C. § 1006(c). Compliance with an industry standard, of course, is voluntary and a carrier could choose a nonstandard implementation. AT&T does not believe such an approach will benefit industry or law enforcement as discussed below. For the Commission's purposes here, it is important to note that the industry is committed to implementing a standardized solution.

¹² 47 U.S.C. § 1008(b).

Therefore, the Section 103 obligations imposed on carriers are not immutable.

Rather, the Commission must ensure a reasonable implementation of CALEA.

II. DISCUSSION

A. Petitions Under the Reasonably Achievable Standard

A telecommunications carrier or any other interested person may petition the Commission to determine that compliance with Section 103 capability requirements is not reasonably achievable.¹³ Section 109 (b) of CALEA sets forth certain factors that the Commission must consider in determining "whether compliance would impose significant difficulty or expense on the carrier."¹⁴ If there is significant expense or difficulty, according to CALEA, the Commission shall determine that compliance is not reasonably achievable.

The Commission specifically seeks comment on the Section 109 factors and how they should be applied to determine whether compliance is "reasonably achievable."¹⁵ AT&T addresses the factors that the Commission must consider below, but begins with a fundamental point: absent commercially available hardware and software implementing the industry standard, compliance with CALEA's capability requirements is not reasonably achievable. As discussed below, non-standard implementations will increase the costs of compliance significantly for both carriers and law enforcement.

Finally, the Commission does not address whether or not the filing of a "reasonable achievability" petition automatically tolls the compliance date. The Commission should, as a matter of course, toll the CALEA compliance date pending determination of a carrier's petition.

¹³ 47 U.S.C. § 1008(b).

¹⁴ 47 U.S.C. § 1008(b).

¹⁵ NPRM, ¶ 48.

The Commission should set reasonable terms and conditions for achieving compliance after the Commission rules on the petition. With the compliance date less than a year away, setting a petition schedule now will aid carriers and the Commission to achieve an orderly process for making determinations on petitions that are certain to be forthcoming.

1. Compliance Will Not Be Reasonably Achievable Until Hardware and Software Is Commercially Available That Implements the Industry Standard.

Congress assumed that an industry standard would be published and available very soon after CALEA was enacted. Any carrier that could not implement that standard (or indeed, any other solution), due to cost or complexity, could petition the Commission for relief. With the uncertainty surrounding the recently published standard, the most important factor for the Commission to consider is the effect of the delayed industry standard on the absence of commercially available hardware or software to implement the standard within the compliance period and thereafter. Without stable technical standards in place to guide manufacturers and carriers, and without adequate time to implement technical solutions, CALEA compliance will never be reasonably achievable.

The absence of stable technical standards for compliance makes it extraordinarily difficult for manufacturers and carriers to meet CALEA requirements not only within the compliance period but thereafter as well. Even though the industry now has adopted an interim standard, it remains under a cloud and subject to the threat of a deficiency petition by the FBI. Nonetheless, carriers and manufacturers have united behind the industry standard and have commenced the task of developing a standardized solution. Without a standard, carriers and manufacturers would have developed a patchwork of individual, ad hoc solutions in order to attempt to meet CALEA compliance by the deadline.

Nonstandard implementations are neither efficient nor desirable. A nonstandard implementation will increase the cost to law enforcement because law enforcement agencies will need to develop collection equipment to receive the intercepted communications and call-identifying information consistent with the implementation solution provided by the carrier. With dozens of different switching platforms now in use and new equipment under development and in testing every day, the cost to law enforcement of receiving wiretap information in a nonstandard manner will escalate dramatically.

Second, the industry already has invested an enormous amount of time and resources into the standardization of surveillance features. For almost three years, carriers and manufacturers have met each month to craft the industry standard. However, given the threat of future enforcement actions after the CALEA deadline, some carriers may feel compelled to implement a nonstandard solution that meets the basic elements of CALEA. And if a carrier takes that course, it likely will be reluctant to move to a standardized solution afterwards, given the added cost and burden of doing so. In short, a carrier will not pay twice for the equipment and software to achieve differing versions of CALEA compliance.

Third, a nonstandard implementation of CALEA will not be as robust as the proposed industry standard. The industry standard anticipates new technologies, developments and applications. It is flexible and scaleable. A nonstandard approach likely will not have any of these characteristics, being designed principally to meet current obligations rather than to anticipate future technological changes in the carrier's network.

2. Section 109(b) Factors

The Commission requests comments on the eleven factors that it must consider to determine whether compliance is "reasonably achievable." Congress instructs the Commission that these nonexclusive factors were designed to realize several policy goals: (i) ensure CALEA

costs to consumers are kept low; (ii) meet the legitimate needs of law enforcement while preventing "gold-plating" of law enforcement's demands; (iii) protect subscriber privacy interests; and (iv) ensure that competition in all forms of telecommunications is not undermined, ensuring that wiretap compliance is neither used as a sword or a shield.¹⁶ With these policies in mind, AT&T addresses each of the factors below. While AT&T discusses each factor in the order in which it is listed in the legislation, the order of the factors is in no way indicative that one factor has any more weight than another. Indeed, any one factor alone could warrant a determination that compliance is not reasonably achievable.

Factor (A): Effect on Public Safety and National Security

The Commission should consider the effect on public safety and national security before granting a petition. But less obvious is how this factor should be considered. To a large extent, the question will be answered by the petition of the carrier (e.g., a carrier may only seek relief from providing call-identifying information under certain circumstances); however, the Commission should consider several likely issues that will arise, such as those issues surrounding the absence of hardware or software compliant with an industry standard, alternative implementations to an industry standard, and geographic considerations.

As AT&T noted, the absence of hardware or software compliant with an industry standard makes it impossible to comply with CALEA in a cost-efficient way. The Commission likely will face reasonable achievability petitions in the future for equipment, facilities or services installed or deployed after January 1, 1995, but before any standard was published or compliant hardware or software was available. The burden should be on law enforcement to demonstrate

¹⁶ 140 Cong. Rec. 10771, 10781 (Oct. 4, 1994) (comments by Rep. Markey).

that these new or recently installed or deployed equipment, facilities or services have become a haven for criminal activity.

The burden of proof should be both quantitative and qualitative. That is, the Commission should ask how many wiretaps have been affected by the new equipment, facilities or services, and what is the nature of the information lost or not otherwise available. For example, the Commission would want to know if there are alternative technologies or capabilities or the facilities of another carrier available to law enforcement to implement the surveillance.

Next, there may be petitions from individual carriers or manufacturers, or from trade associations, that suggest compliance with the industry standard is not reasonably achievable for a variety of reasons.¹⁷ The petitioner might propose an alternative implementation that would be achievable such as a call-forwarding solution only.¹⁸ Indeed, cost data might show that more carriers could provide a basic set of surveillance features -- something less than the industry standard -- at a much cheaper cost, therefore allowing more surveillance capability to be available in the long run. In short, the Commission might have to consider a scaled-down version of the standard in order to provide more surveillance capability in more locations by more carriers, assuming the price of even meeting the standardized solution is too high for some smaller carriers and perhaps new market entrants.

¹⁷ AT&T is not aware of any entity that has proposed filing such a petition, but given the enormous cost of CALEA compliance based on AT&T's own preliminary vendor implementation information for the industry standard, it seems likely that some carriers will not be able to afford the industry "safe harbor" and therefore will seek relief from the Commission.

¹⁸ As the Commission may be aware, the inability to follow the target's call was one of the major issues leading to CALEA. House Report at 3495.

Finally, the Commission should consider the likelihood that interceptions will be required only in certain geographic areas because wiretaps historically have been clustered in a few geographic areas. Therefore, location and coverage of the carrier should be an important part of the Commission's analysis. Half of the wiretaps in the United States occur in the New York metropolitan area and over one-third of all wiretaps involve cellular technology.¹⁹ About fifty percent of the wiretaps involving cellular services occur in two states, New York and Florida, and eighty percent occur in six states.²⁰ The wiretaps that do occur are concentrated in metropolitan areas.²¹ Thus, a determination in favor of a cellular rural service area with no history of wiretaps is not likely to have a major effect on law enforcement's needs. Conversely, in the surveillance-rich centers, capabilities would be more important and weighted accordingly.

This is not to say that AT&T advocates the creation of geographic zones where criminals are free from wiretaps, but based on the FBI's wiretap statistics, electronic surveillance equipment may never need to be employed in certain rural or low surveillance areas. For emergency or exigent circumstances, where wiretaps are required, Section 103(c) of CALEA allows carriers to permit monitoring at their premises if that is the only means of accomplishing the interception.²² Therefore, the most pressing needs of law enforcement may be met even

¹⁹ Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings on H.R. 4922 and S. 2375 Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, (hereinafter "Joint Hearings") 103 Cong. 132 (1994) (statement of Roy M. Neel, President, United States Telephone Association).

²⁰ Id. at 103 Cong. 156 (1994) (prepared statement of Thomas E. Wheeler on behalf of the Cellular Telecommunications Industry Association).

²¹ Id.

²² 47 U.S.C. § 1002(c).

where no technical changes have been made to permit delivery of intercepted communications to law enforcement off-premises.

Of course, just because a carrier is in a high crime area does not mean that other factors will not offset the public safety concerns. In fact, the remainder of the Section 109 factors all address the economic impact of CALEA compliance. A Commission determination that certain CALEA capabilities are not reasonably achievable does not mean that the surveillance is barred. Rather, Section 109(b)(2)(A) specifically provides that if compliance is not reasonably achievable, the Attorney General may agree to pay the carrier for the additional reasonable costs of making compliance achievable.²³ Thus, public safety and national security needs always can be met with an agreement that government will pay for the otherwise unachievable equipment, facilities or services.

Factor (B): Effect on Residential Telephone Service Rates

Congress admonished the Commission to ensure that CALEA compliance would have a minimum adverse effect on telephone rates.²⁴ "Basic residential telephone rates" in this factor should encompass all subscriber charges, whether wireless or wireline.²⁵

Over time, as new technologies become available or mature, consumers will use a broader range of technologies, including wireline services, mobile services and fixed wireless local loops, for their personal communications. It is important that the Commission recognize that

²³ 47 U.S.C. § 1008(b)(2)(a).

²⁴ See House Report at 3515 (Statement of Rep. Edwards and Rep. Boucher).

²⁵ If the Commission concludes that telephone rates do not cover all charges a subscriber to any telecommunications service might otherwise pay, then certainly this is a factor the Commission would consider under Factor (K): other factors the Commission determines are appropriate.

adverse impacts on rates for any type of telecommunications services can be detrimental to the public interest because these services may become as essential to the well-being and safety of individuals as conventional wireline residential service.

Thus, the question for the Commission to answer in response to any petition is how much will subscriber rates for the affected services increase to provide this surveillance service to law enforcement. Rates will not only be affected by the capital costs of CALEA technology, but also by any additional costs a carrier will have to incur for operation and maintenance of electronic surveillance systems, including the security measures addressed in this NPRM.

In wireless services in particular, the Commission also should give careful consideration to economic trends affecting wireless carriers. As competition intensifies, wireless carriers will continue to reduce service prices to attract additional customers, an increasing percentage of whom, research shows, are extremely sensitive to cost. Thus, wireless carriers must, like any other business, grapple with the challenge of minimizing costs in order to keep prices low -- or enable further price reductions -- without sacrificing service quality. At the same time, wireless carriers must accommodate a host of new fees and mandates such as universal service fund contributions, E-911 implementation requirements, number portability costs, and a variety of new local sales, use and property taxes. Directly or indirectly, these additional costs ultimately will be passed on to the consumer.²⁶

²⁶ AT&T's customer research shows that an increase in monthly bills of even \$1 will adversely affect consumer acceptance of wireless services. It is highly likely that CALEA compliance, along with other externally-imposed costs that the industry must contend with, will total more than that \$1 per month for average subscribers. Assuming that the incremental expense borne by consumers is between \$1 and \$3, the wireless industry can expect a reduction of between 1% and 1.3% overall. Thus, the correlation between customer rates and the growth of the wireless industry is clear.

Finally, maintaining a low threshold for acceptable increases in rates will serve to limit what may otherwise be law enforcement demands for excessive capabilities. If costs simply can be passed on to carrier customers, there is no incentive for government agencies to weigh the costs and benefits to the public of compliance. Because building surveillance capabilities gives no advantage to consumers of a particular service, or to the serving carrier, it is unfair to make them bear the total costs of CALEA compliance. Thus, the Commission will have to decide whether a carrier's subscribers should pay for a surveillance service that more properly should be paid for by the public as a whole.²⁷ Accordingly, AT&T urges the Commission to establish a "rule of reason" for this factor, and require only those compliance costs that have a de minimis impact on rates.

Factor (C): The Need to Protect the Privacy and Security of
Communications Not Authorized to Be Intercepted

The Commission has the responsibility to protect the privacy and security of nontargeted communications. Where installation of required technology would create a risk that the privacy of some subscribers could be compromised, the Commission previously has relieved carriers from regulatory compliance.²⁸ Nothing in CALEA should cause the Commission to deviate from this precedent and possible compromises of subscriber privacy should warrant, standing alone, a determination that compliance is not reasonably achievable.

²⁷ CALEA was crafted carefully to avoid an unconstitutional taking of carrier property. The Section 109 claims process was intended to ensure carrier reimbursement for its costs of compliance. If costs are not recoverable from either the government or the subscriber, in all likelihood carriers would seek compensation through a Tucker Act claim directly under the Act.

²⁸ See, Rules and Policies Regarding Calling Number Identification Service -- Caller I.D., 11 FCC Rcd 11437 (1996).

**Factor (D): The Need to Achieve the Capability Assistance Requirements
of Section 103 by Cost-Effective Methods**

This factor underscores the need for standards-compliant hardware and software to be commercially available for carriers to reasonably meet CALEA's requirements. CALEA's capability assistance requirements cannot be achieved cost-effectively without a standard.

This factor also requires that law enforcement prioritize its surveillance needs. Certain capabilities may be more achievable than others and more achievable in certain locations in the network than in others. Based on carrier network configurations and law enforcement needs, the Commission could require that law enforcement needs be prioritized and solutions be evaluated for cost-effectiveness in light of these priorities. For example, the Commission could specify that the most cost-effective solution to meeting the single largest problem (for example, call forwarding) might be to require the carrier to pay for that feature that will solve that particular problem but to deem any other capabilities not reasonably achievable.²⁹

**Factor (E): Effect on the Nature and Cost of the Equipment, Facility, or
Service at Issue**

Congress did not authorize or require the wholesale re-architecture of switching platforms or the obsolescence of designs that have been in existence for years. CALEA compliance should not be permitted to change the fundamental nature of a telecommunications carrier's system.

For example, a carrier should not be required to purchase future switching equipment from one vendor that provides a certain capability when that carrier's current vendor

²⁹ Even though CALEA-compliant equipment might be commercially available in accordance with a publicly available industry standard, some carriers may not be able to comply with all features or capabilities. Indeed, some parts of the standard simply may not be reasonably achievable and therefore the Commission may be called upon to parse the standard, and law enforcement called upon to prioritize its needs.

provides another (or even no) solution. Nor should carriers be required to replace existing switches or facilities or redesign their networks.

Factor (F): Effect on the Operations of the Equipment, Facility, or Service
at Issue.

As with the previous factor, a carrier should not be forced to make changes to its equipment, facilities or services that would adversely affect the quality of service it can offer to the public or significantly increase maintenance or other operating costs. At the very least, the Commission should consider these impacts in reaching its decision.

For example, any technical solution that would delay the transmission of normal communications should be rejected. Timing requirements that would require a carrier to deliver intercepted communications more quickly than ordinary call processing should be rejected. Such a requirement would require priority of service for surveillance and goes beyond the intent of the legislation.

Factor (G): Policy of United States to Encourage Provision of New
Technologies and Services to the Public

During the CALEA hearings, Congress made it clear that CALEA implementation should not stand in the way of technological innovation in the telecommunications industry, nor was the FBI to have veto power over new technologies. Senator Leahy stated: "I would be very concerned to see the Government in a position of determining how the rest of us move into the 21st century."³⁰ Recognizing the economic importance of the telecommunications industry, Senator Leahy also stated:

I am also well aware of the fact that one of the areas where our country has an advantage over most other countries in the industrialized world is in the area of telecommunications. We have pushed the envelope as far as

³⁰ Joint Hearings, 103 Cong. at 88.

anybody ever thought you could in everything from our computers to that a lot of our most effective industries today exist because they can move everything from vast amounts of data, blueprints, to phone conversations in matters of seconds across country and so forth.³¹

Senator Leahy expressed concern that law enforcement's needs for electronic surveillance "not intrude or inhibit what is one of the most remarkable parts of the industrial might of our country and our export ability."³²

Thus, Congress left no doubt that no one should be prevented from deploying new technology or services because a CALEA solution would be difficult, expensive, or simply not available. Consumers and the economy ultimately will benefit from the abundance of technologies being developed today and each technology should be given the opportunity to be brought to market based on its merits, unaffected by the expense of CALEA compliance.³³ For example, the Commission has recognized that technological innovation in wireless services brings important benefits to consumers, such as innovative services at reasonable rates.³⁴

AT&T knows from experience that even without the added cost of CALEA technology, bringing new wireless technology and services to market is often very expensive. Adding the costs of CALEA compliance to the basic costs of the new technology or services may make particular technologies and services unprofitable and result in a decision not to introduce a

³¹ Id. at 51-2.

³² Id. at 52.

³³ Of course, Congress recognized that it would be incumbent on all carriers to design CALEA compliance into new technologies where possible. AT&T expects the Commission will balance this factor with other factors, including the extent to which the design of the technology was underway at the time CALEA was passed as well as the presence or absence of any CALEA standard.

³⁴ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, 8020 (1994) ("CMRS Third Report and Order").

particular new technology or service. Regulatory impediments to the introduction of new technology inhibit competition, thus working contrary to the competition policies that Congress and the Commission have actively promoted in recent years.

For example, the wireless market is undergoing an explosion of new technologies, services and applications, due in part to the regulatory changes aimed at promoting competition. To halt such development at a time when the public is reaping enormous economic benefits from innovations in telecommunications technology is poor public policy. The Commission must ensure that CALEA compliance is considered to be not reasonably achievable when compliance would result in new technologies or services being kept from the market or being priced out of the reach of groups of customers who could benefit from the new technologies or services.

Factor (H): Financial Resources of the Carrier

Financial resources certainly need to be weighed when looking at whether compliance is reasonably achievable for a telecommunications carrier. However, this factor is complicated by the tremendous growth of the telecommunications industry. Relieving a new entrant of the cost of CALEA compliance may be the equivalent of a unfair subsidy for that carrier. Imposing the cost of CALEA compliance only on the largest carriers would constitute an unfair regulatory burden. Any petitioner should bear the burden of demonstrating unique circumstances that so differentiate the petitioner from other carriers as to warrant relief under this factor.

Factor (I): Effect on Competition in the Provision of Telecommunications Services

AT&T is concerned that the cost of CALEA compliance may disproportionately fall on wireless carriers and impede competition in that vital market. Preliminary estimates from switch vendors suggest that the cost of CALEA implementation will be enormous, especially for wireless carriers. How petitions are handled by the Commission certainly will affect competition.

Thus, the Commission should strive to ensure market-neutral decisions, especially between carriers operating in the same markets.

Congress clearly indicated that CALEA was not to reverse the industry trend toward rapid deployment of new telecommunications technologies and services arising from the break-up of the Bell system. It further indicated that it is national policy to promote competition in the telecommunications industry and to support the development and widespread availability of advanced technologies, features and services.³⁵

For example, to foster this competition policy, Congress established a new regulatory framework for commercial mobile radio services.³⁶ Congress mandated that substantially similar mobile radio services must be accorded similar regulatory treatment to ensure that economic forces--not disparate regulatory burdens--shape the development of the wireless marketplace.³⁷ At the direction of Congress, the Commission has sought to create a regulatory environment in which carriers can take advantage of technological innovation to modify their service offerings to compete against other carriers in trying to serve emerging consumer needs and demand for new and varying types of wireless services.³⁸ If the costs of CALEA compliance are disproportionate for similar types of wireless services, the policy of regulatory parity will be thwarted, notwithstanding all the time and energy devoted by the Commission to implementation of regulatory parity and the innovation and competition that has already emerged as a direct result

³⁵ House Report at 3494.

³⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-11, Title VI § 6002(b), 107 Stat. 312, 392 (1993).

³⁷ CMRS Third Report and Order at 7994.

³⁸ Id. at 8011.

of the regulatory changes.³⁹ The result could be a less dynamic marketplace for wireless technologies with a concomitant adverse effect on the national economy.⁴⁰

Costs also may fall disproportionately on certain companies -- wireline and wireless -- and affect their competitive position. Carriers that have to bear their own costs for installing electronic surveillance capabilities will suffer a competitive disadvantage with respect to those carriers whose costs are reimbursed fully or who are otherwise granted relief by the Commission. These competitive disadvantages have the potential to impact the wireless market greatly given that the market is already subject to intense competition and carriers have a limited ability to recoup any sunk costs. The Commission must assure that CALEA compliance burdens are competitively neutral.

Factor (J): Extent to Which the Design and Development of the
Equipment, Facility, or Service Was Initiated Before January 1,
1995

CALEA was not intended to render obsolete entire classes of switching equipment. To the extent that equipment was commercially available on or before January 1, 1995, and a carrier had ordered, purchased, stored for installation, or otherwise contracted for the product, the Commission should recognize that it is not reasonable to require carriers to retrofit that equipment. These carriers should receive treatment similar to those whose equipment, facilities and services are grandfathered out of CALEA compliance given actual installation on or before January 1, 1995 because many of the considerations that resulted in this grandfathering apply equally to both groups.

³⁹ It is equally important that CALEA responsibilities not fall disproportionately on facilities-based carriers, who may be adversely affected as a competitor, if certain carriers purchasing unbundled services can avoid the impact of CALEA.

⁴⁰ The same point also applies to wireline competition.

AT&T recognizes that the FBI has promulgated rules that define "installed or deployed" very narrowly. The FBI's Final Rule adopts a definition of "installed or deployed" that restricts its application to equipment, facilities, and services "operable and available for use" by each carrier's customers as of January 1, 1995.⁴¹

As a result of this overly restrictive definition, equipment that is CALEA-compliant for one carrier is not CALEA-compliant for another, and millions of dollars of equipment potentially has been rendered obsolete. Costs incurred to modify a specific platform model under production at the time of CALEA, under contract before January 1, 1995, and even deployed elsewhere in the carrier's network, are not eligible for reimbursement under the Final Rule. If this definition stands, the Commission can expect carriers to seek relief through a petition under this section.

Factor (K): Other Factors the Commission Determines Are Appropriate

The enumerated factors are not exclusive and the Commission should permit carriers to present other circumstances to be taken into account in any determination of reasonable achievability. Congress recognized that there would be many circumstances that could not be anticipated in a statute for this dynamic industry. Thus, individualized determinations based on unique carrier circumstances always will be required, much as unique circumstances have resulted in waiver of Commission rules where application of a rule is inequitable, unduly burdensome or contrary to the public interest or the underlying purpose of the rule would not be served or would be frustrated.⁴²

⁴¹ The Final Rules are set forth at 28 C.F.R. §§ 100.9-100.21.

⁴² See, e.g., 47 C.F.R. § 22.119(a).